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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 938

UNITED STATES OF AMERICA, PETITIONER

v.

GUS L. CONSTANTINE, ALIAS DR. GUS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the above case on March 15, 1935 (R. 50), a petition for a rehearing having been denied April 2, 1935 (R. 51), reversing a judgment of the District Court of the United States for the Northern District of Alabama.

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 47) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 15, 1935 (R. 50), and a peti-

tion for rehearing denied April 2, 1935 (R. 51). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Rule XI of the Rules of Practice and Procedure With Respect to Proceedings in Criminal Cases after Verdict or Finding of Guilt, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether Section 701 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 95, U. S. C. App., Title 26, Sec. 206), imposing a special excise tax of $1,000 on persons carrying on the business of a brewer, distiller, wholesale or retail liquor dealer, wholesale or retail dealer in malt liquor, or manufacturer of stills, in any place where such business is prohibited by the law thereof, is valid, in view of the repeal of the Eighteenth Amendment.

STATUTE INVOLVED

Section 701 of the Revenue Act of 1926 will be found in the Appendix, *infra*, pp. 11–12.

STATEMENT

On November 21, 1934, the United States Attorney for the Northern District of Alabama filed an information in the District Court of the United States for that district, charging that the respondent on October 8, 1934, at Birmingham, Alabama, carried on the business of a retail dealer in malt liquor, which business was contrary to the laws of the State of Alabama, without having paid the

special excise tax of $1,000 as required by Section 701 of the Revenue Act of 1926 (R. 2).

A demurrer and a motion to quash the information were filed by the respondent, the principal grounds being the alleged invalidity of Section 701 (R. 5–13). The demurrer and the motion to quash were overruled (R. 31). The respondent then pleaded not guilty and waived a jury trial (R. 14).

A stipulation of facts was signed by attorneys for the respondent and the United States Attorney, and filed (R. 15–21). It admitted that the respondent was carrying on the business of a retail dealer in malt liquors at the time stated in the information, in violation of the laws of Alabama and of Birmingham, and that he had not paid the $1,000 prescribed by Section 701, *supra,* though he had paid the $25 tax imposed upon retail liquor dealers by R. S. 3244 as amended (U. S. C., Title 26, Sec. 205), for the current year (July 1, 1934, to June 30, 1935). The stipulation stated further that no demand for the $1,000 levy was made upon the respondent until about October 1, 1934. The court found as a conclusion of law that the respondent had violated Section 701 and "That the said section provided for a tax and not a penalty and that the tax so provided, was a valid tax" (R. 28). The respondent was accordingly sentenced to pay a fine of $250 (R. 32).

This judgment was reversed by the Circuit Court of Appeals for the Fifth Circuit (R. 54).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 701 "imposed a penalty as part of the enforcing machinery of the Eighteenth Amendment, and fell with it."

2. In holding in effect that Section 701 imposes not an excise tax but a penalty dealing with a subject left or committed by the Constitution to the control of the States.

3. In holding that even if Section 701 be construed as imposing an excise tax, it would be invalid because "it is wanting in that geographical uniformity essential to the valid exercise by Congress of such taxing power."

4. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision below is erroneous.

(a) Section 701 imposes an excise tax under the general power of Congress to tax, and not a penalty for violation of liquor prohibition laws.

Section 701 in substantially its present form appears first as subsection 12 of Section 1001 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1128, which was approved February 24, 1919. The Revenue Bill was, of course, pending before Congress for a considerable period of time and the House Report on the Bill, referred to below, which was submitted to the House on September 3, 1918, reveals that the tax in question was then included in the Bill. The Eighteenth Amendment to the Con-

stitution was not ratified until January 29, 1919, and did not become effective until one year later (U. S. C., Amendment 18, Secs. 1, 3). The National Prohibition Act, c. 85, 41 Stat. 305, was not enacted until October 28, 1919, and except as to the wartime prohibition and certain other provisions, was not in force until the effective date of the Eighteenth Amendment (Sec. 21, Title III).

Subsection 12 of Section 1001 of the Revenue Act of 1918 was reenacted as subsection 12 of Section 1001 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 296; as subsection 9 of Section 701 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 327; and finally as Section 701 of the Revenue Act of 1926.

House Report, No. 767, 65th Congress, 2d Session, on the Revenue Bill of 1918, found in House Reports, Vol. 1, 65th Congress, 2d Session (Cong. Doc. 7308), under the heading Title X, Special Taxes, states (p. 35):

> After considering all the special tax sources suggested to your committee it has endeavored to select such special taxes as would yield considerable revenue and at the same time well distribute the burden of taxation and be capable of satisfactory administration by the Treasury Department. It is believed that the special taxes recommended in the proposed bill will yield about $165,000,000 annually.
>
> The following table shows the special taxes levied under existing law and the proposed bill:
>
> * * * * *

The tax in question is listed among twenty-eight others, including taxes upon pawnbrokers, circuses, bowling alleys, riding academies, shooting galleries, and the use of yachts. This report was submitted September 3, 1918. There is not the slightest reference in the report to any relation of the tax to the Eighteenth Amendment, or to its aiding in the enforcement of the liquor prohibition laws in dry States.

The tax is listed in the report as follows:

> Carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, or manufacture of stills, contrary to the laws of any State, Territory, or District, in any place in which carrying on such business is prohibited by local or municipal law, in addition to all other taxes . . . . $1,000.00.

Such a business was an obvious source of revenue to finance the War. The illicit dealer in liquor is a distinct species, differing essentially from the legitimate dealer, and was therefore properly classified for taxation purposes in a separate category. Section 1001 of the Revenue Act of 1918, in which the proposed tax was enacted, contains eleven other special occupational taxes—brokers, pawnbrokers, ship brokers, customhouse brokers, proprietors of theatres, of circuses, of other public exhibitions, of bowling alleys, of shooting galleries, of riding academies, and persons operating automobiles for hire. Various distinctions in these occupations are made. Thus a broker who was a member of a

stock exchange paid more than one who was not. A theatre proprietor in a town of five thousand inhabitants or less was treated differently from one in a larger city. Chautauquas were exempted entirely.

The twelve items were continued in the Revenue Act of 1921. Proprietors of theatres, circuses, and other public exhibitions were omitted in the corresponding section of the Revenue Act of 1924. All except the unlawful liquor dealer were omitted in the Revenue Act of 1926.

There is thus nothing to indicate that Congress was attempting primarily to stamp out the unlawful traffic in liquor by the imposition of this levy. But the mere fact that Congress in selecting the subject for taxation did have some social or governmental effect in mind, would not invalidate the law. *Veazie Bank* v. *Fenno,* 8 Wall. 533; *McCray* v. *United States,* 195 U. S. 27; *United States* v. *Doremus,* 249 U. S. 86.

In *United States* v. *La Franca,* 282 U. S. 568, the United States was suing to recover, among other items, $1,500, being the special tax imposed by Section 701 of the Revenue Act of 1924 for nine months, that is, $750 doubled under Section 35, Title II, of the National Prohibition Act (U. S. C., Title 27, Sec. 52). The defense was a prior criminal conviction for the same acts giving rise to the special tax. This Court, in sustaining that defense, refers to the *doubled* tax as in its nature a penalty though called a tax.

There is no doubt that the doubling of the tax by the National Prohibition Act converted it into a penalty. It does not follow, however, that with the National Prohibition Act repealed, the levy of the tax in its original form constitutes a penalty.

In *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20, 36, this Court held unconstitutional the so-called child-labor tax of the Revenue Act of 1918, 40 Stat. 1138, by which was imposed a levy of ten percent of the net profits of any person employing children below certain specified ages in mines and factories because, while in the form of a tax, it really imposed a penalty "for a departure from a detailed and specified course of conduct in business." It said that this was apparent on the face of the statute itself, because of its provision granting relief from the tax because of lack of knowledge of the age of the child employed, its provisions permitting inspection of factories and mines not only by the taxing officers of the Treasury but also by the Secretary of Labor and his subordinates, etc. The Court accordingly declared the Act invalid as being an attempt by Congress, in the guise of a taxing measure, to regulate a subject which was exclusively a State function under the Federal Constitution.

The levy involved in the above case is clearly distinguishable from that imposed by Section 701. There is no purpose to control State action in the latter. The obvious purpose is to raise revenue from an occupation which the State prohibits. The

tax gives no right to conduct the occupation prohibited by the State. But the mere fact that it is so prohibited does not prevent the exercise by Congress of its taxing power. *License Tax Cases,* 5 Wall. 462, 472–473.

It is submitted therefore that Section 701 clearly imposes a tax and not a penalty.

(b) The tax is uniform within the meaning of the Constitution.

The constitutional requirement is geographical uniformity throughout the United States. That uniformity exists where, as in the instant case, the tax operates with the same force and effect wherever the subject of it is found. *Head Money Cases,* 112 U. S. 580, 594; *Knowlton* v. *Moore,* 178 U. S. 41, 108–109; *Florida* v. *Mellon,* 273 U. S. 12, 17.

2. While there is as yet no conflict of decisions among the Circuit Courts of Appeals, there is considerable conflict among the District Courts. In addition to the District Court for the Northern District of Alabama in the instant case, the District Court for the Northern District of Oklahoma in *United States* v. *Kesterson,* 8 F. Supp. 680,[1] and the District Courts for the Northern District of Texas and the Eastern District of Pennsylvania in *United States* v. *Arthofer* and *United States* v. *Columbia Fruit Products Co.* (both unreported), have held that Section 701 is valid. On the other

[1] In this case the Circuit Court of Appeals on April 8, 1935, held on an appeal that Section 701 is invalid. Its decision has not yet been reported. The Government intends to apply for a writ of certiorari to review this decision.

hand, the District Courts for the Eastern District of South Carolina, the Southern District of Alabama, the Southern District of Georgia, the Northern District of Florida, and the District of Idaho, have held the statute invalid in the following cases: *Brabham* v. *Cooper, Collector,* 9 F. Supp. 904; *Cleveland* v. *Davis, Collector* (unreported); *Green* v. *Page, Collector,* 9 F. Supp. 844; *Liberis* v. *Nee, Collector,* and *Senate Club* v. *Viley, Collector* (both unreported). A number of other suits are now pending in the District Courts and decisions are being withheld pending the final disposition by this Court of the instant case.

3. The Treasury Department has been and is proceeding to collect this special excise tax, and since the repeal of the Eighteenth Amendment a total of $627,819.02 has been collected up to and including the week ended March 16, 1935. The total assessments made for the tax from July 1, 1934, to February 28, 1935, inclusive, amount to $7,048,308.97. A decision by this Court upon the validity of this special excise tax is thus highly desirable as a guide to the administrative officers and the courts below and would be in the public interest generally.

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

MAY 1935.

APPENDIX

Section 701 of the Revenue Act of 1926 (U. S. C. App., Title 26, Sec. 206) provides that—

> On and after July 1, 1926, there shall be levied, collected, and paid annually, in lieu of the tax imposed by section 701 of the Revenue Act of 1924, a special excise tax of $1,000, in the case of every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacturer of stills, as defined in section 3244 as amended and section 3247 of the Revised Statutes, in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law. The payment of the tax imposed by this section shall not be held to exempt any person from any penalty or punishment provided for by the laws of any State, Territory, or District for carrying on such business in such State, Territory, or District, or in any manner to authorize the commencement or continuance of such business contrary to the laws of such State, Territory, or District, or in places prohibited by local or municipal law.

Any person who carries on any business or occupation for which a special tax is imposed by this section, without having paid such special tax, shall, besides being liable for the payment of such special tax, be subject to a penalty of not more than $1,000 or to imprisonment for not more than one year, or both.

U. S. GOVERNMENT PRINTING OFFICE: 1935